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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 507

THE H. ROUW COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

HARRY L. HALL,
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INDEX

Opinions of the Courts Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2

Statement 4

Argument 3

The Consignees Have No Property Rights That Have Been Destroyed As Claimed by Petitioner 14

Petitioner's Authorities 15

The Question of Accounting Is Not in the Case 16

The Perishable Agricultural Commodities Act Has No Application to This Case 16

The Question of Cartage 17

The Decision in Secretary of Agriculture v. United States 18

Conclusion 19

List of Authorities

CASES

A. J. Conroy, Inc., v. Weyl Zuckerman & Co., (D.C. Cal. 1941) 39 F. Supp. 784 16

Baltimore & O. C. Terminal R. Co. v. Becker Milling Mach. Co., (C.C.A. 7, 1921) 272 F. 2d 933 11

Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co., 253 U.S. 97, 40 S. Ct. 504, 64 L. Ed. 801 8, 9

Consolidated Naval Stores Co. v. F. A. H. S., 227 F. 2d 923 5

Crail v. Illinois Central R. R. Co., 2 F. 2d 287; 13 F. 2d 459; 21 F. 2d 836; 31 F. 2d 111; 281 U.S. 57, 50 S. Ct. 180, 74 L. Ed. 699 9, 10, 11

Daniel v. First National Bank of Birmingham, 227 F. 2d 353, rehearing denied 228 F. 2d 803 5

Ill. Cent. R. Co. v. Crail, 281 U.S. 57, 50 S. Ct. 180 8, 9

L. Gillarde Co. v. Joseph Martinelli & Co., (C.C.A. Mass. 1948) 169 F. 2d 60 16

Milwaukee and St. Paul Ry. Co. v. Arms et al., 91 U.S. 489, 23 L. Ed. 374 8

Reider v. Thompson, 197 F. 2d 158 (C.C.A. 5th) 13

Sears Roebuck Co. v. Johnson, 219 F. 2d 590 5

Secretary of Agriculture of the United States v. United States et al., 350 U.S. 162, 76 S. Ct. 244 18

Texas and New Orleans Railroad Co. v. The H. Rouw Company, 271 SW 2d 666 12, 17

Thompson v. The H. Rouw Company, 237 SW 2d 662 12

U. S. v. Northern Pac. Ry. Co., 116 Fed. Supp. 277 (D.C. Minn., 1953) 12

United States v. United States Gypsum Co., 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525 5

Waterman S. S. Corp. v. United States S. R. & M. Co., 155 F. 2d 687 (C.C.A. 5, 1946) 11

Weirton Steel Co. v. Isbrandtsen-Moller Co., Inc., 126 F. 2d 593 (C.C.A. 2, 1942) 11

TEXT AND STATUTES

American Jurisprudence, Vol. 15, p. 400, Secs. 12, 13 8-9

Title 7, U. S. C., Chapter 20a, Section 499 16

28 U.S.C., Section 1254 (1) 2

Title 49, U.S.C.A., Section 20, Paragraph 11 2, 7, 9, 18, 19

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The two memorandum opinions of the District Court (R. 165, 197) are unreported, but appear at pages 165 and 197 of the Record. The final judgment of the trial Court appears at page 195 of the record.

The opinion of the Court of Appeals is reported in 158 F. 2d 445.

JURISDICTION.

The judgment of the Court of Appeals was entered August 27, 1958. Petitioner's first motion for rehearing was denied, with one modification on September 24, 1958, and its second petition for rehearing was denied on October 27, 1958. Respondent has not been advised as to the date upon which the petition for writ of certiorari was filed in this Court but a copy of such petition was received by counsel for Respondent on November 10, 1958. Petitioner has invoked the jurisdiction of this Court under the provisions of 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED.

Are the provisions of Title 49, Section 20, Paragraph 11, U.S.C., to be construed in such manner as to justify the recovery by Petitioner, as the shipper and owner of perishable goods in interstate commerce, of a greater sum than is actually required to compensate or indemnify it for the loss which it actually sustained or is such recovery to be properly limited to such amount as will fully compensate and indemnify Petitioner for such loss.

STATUTE INVOLVED.

The statute primarily involved is the Interstate Commerce Act, Title 49, U.S.C.A. Section 20, Paragraph 11, the pertinent provisions of which are as follows:

> "Sec. 20, par. (11): Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of

this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt, or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or

bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void:"

STATEMENT.

Petitioner sued to recover the sum of $9,416.10, together with interest and costs, for alleged damage to twelve cars of tomatoes and canteloupe delivered to the predecessor of Respondent for shipment in interstate commerce, each car constituting one count in the complaint (R. 15-35). Respondent denied liability and specifically pleaded that if Petitioner recovered, there should be deducted in any judgment rendered the 8% commission which Petitioner would have had to pay to effect sale of the twelve cars on the additional amount they would have brought had they not been damaged in transit and an item of 50 cents cartage on the car involved in Count XI (R. 25-61). The trial court, without a jury, found that each car sustained damage during transit and that the total transportation damage to the twelve cars was $3,856.00 (R. 166, 167) and rendered judgment in favor of Petitioner against Respondent for $4,548.89, including interest to the date of judgment, to bear interest at the rate of 6% per annum from date of judgment until paid, and for costs (R. 191-192). The trial court found that the 8% commission which Petitioner would have been required to pay to effect sale of the twelve cars had they arrived without damage, would be 8% of the total amount of damage found or the sum of $308.48 plus the item of 50 cents cartage on Count XI, making a total of $308.98.

The trial court held that the provision of the Interstate Commerce Act involved fixes an unyielding rule on

measure of damages to be the difference between the wholesale market price of the commodities had they arrived in the condition they should have been had they been properly and promptly transported and the same market value in the condition in which they were delivered (R. 166).

All of the pertinent evidence bearing upon the issue of damages consisted of written depositions of D. C. Buel, General Manager of Petitioner, Dominic Strazzulla, Harry Klein and Max Feldbaum together with various documentary evidence. Accordingly the Court of Appeals was not bound by the "clearly erroneous" rule but could consider the evidence and draw other inferences and conclusions from the same than did the trial court. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525; *Consolidated Naval Stores Co.* v. *F. A. H. S.*, 227 F. 2d 923; *Sears Roebuck Co.* v. *Johnson*, 219 F. 2d 590; *Daniel* v. *First National Bank of Birmingham*, 227 F. 2d 353, Rehearing Denied 228 F. 2d 803.

On consideration of the appeal, on the basis of the record and the evidence before it, the Court of Appeals held:

> "The evidence before the court below fairly established that shippers, including appellee, universally paid brokers a commission to dispose of such shipments at destination. That commission represented a charge each shipper was bound to pay upon the full amount received, so that a carload of tomatoes would yield to the owner the amount for which it was sold, less the commission incurred in making the sale. By allowing appellee the gross amount of the difference between the market value of the shipments in damaged condition and the value which would have been applied if the shipments had not been damaged, the court did not deduct from this difference the amount of commissions which would have been incurred in selling them.

> The action of the court below in awarding appellee damages in full gross amount of the difference between the two market values necessarily resulted, therefore, in the enrichment of appellee to the extent of the nondeducted commission, and permitted it a recovery of more damages than it actually suffered. * * *
>
> "We think that the rigid application of the market value rule here resulted in awarding appellee more than its actual loss; and there is ground to believe that the court below had the same feeling.
>
> "We are not, however, undertaking to weigh or appraise the evidence as to damages. We hold simply that the judgment appealed from clearly includes the award of some damages to which appellee was not entitled, growing out of the holding of the court below that no deduction should be made of sales commissions and other charges figured on the amount of the difference in market values between delivery in good order and delivery in bad order. Appellee's recovery should be based upon this difference in market values, but not to exceed indemnity."

The judgment of the trial Court was reversed and the cause remanded for the adjustment of the award of damages according to the evidence and in consonance with the opinion of the Court of Appeals.

The uncontroverted testimony in the record discloses that on consigned cars such as the ones here involved. Petitioner reserves full power and authority to direct the consignee as to what disposition shall be made of the cars upon arrival at destination (R. 80); that Petitioner has never remitted any part of a recovery obtained by it on loss and damage claims to the consignees on cars such as the ones in question since 1952 or 1953 (R. 87-88); that if Petitioner recovers on the twelve cars in question no portion of it will be paid to the consignee commission mer-

chants (R. 89-90, 91). Dominic Strazzulla, Harry Klein, and Max Feldbaum each testified that they handled consigned cars on a commission basis of 8% on the total price for which they actually sell a car; that they never charge a commission on other than what they actually realize on sale of a car; that they neither expect to receive, nor are they entitled to, nor will they be paid any part of any judgment for loss or damage which Petitioner is able to recover from Respondent on the twelve consigned cars in question (R. 106, 110, 112, 123-125, 149-150, 151-152).

The issue directly presented to this Court therefore is whether or not, under the uncontroverted facts in this case, the proper measure of damages was applied by the trial Court or by the Court of Appeals. It is Respondent's contention that, under the case made, and reflected by the record, the Court of Appeals correctly construed the provisions of Title 49, U.S.C.A., Section 20, Paragraph 11, and held that Petitioner was entitled to nothing more than compensation or indemnity for the loss sustained by it in the transportation of the twelve cars in question and that to hold otherwise would, contrary to the intention of Congress in the enactment of such legislation, penalize Respondent, allow Petitioner to realize more from the damaged cars than it would have realized had they been transported without any damage whatsoever and so unjustly enrich Petitioner at the expense of Respondent.

ARGUMENT.

The basic principle underlying the award of damages at common law is that the award made to the damaged party shall afford only compensation for the injuries suffered. *Milwaukee and St. Paul Ry. Co.* v. *Arms et al.*, 91 U.S. 489, 23 L. Ed. 374; *Ill. Cent. R. Co.* v. *Crail*, 281 U.S. 57, 50 S. Ct. 180. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions. *Chicago, M. & St. P. Ry.* v. *McCaull-Dinsmore Co.*, 253 U.S. 97, 40 S. Ct. 504, 64 L. Ed. 801.

American Jurisprudence in its discussion on Damages, also states the rule:

> "The fundamental principle of the law of damages is that one injured by a breach of a contract or by a wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act, which gives rise to the action. Hence, actual pecuniary compensation is the general rule, whether the action is on contract or in tort, except where the circumstances warrant the allowance of exemplary damages, and aside from the fact that one is always entitled to nominal damages for the vindication and protection of his right." Vol. 15, p. 400, Sec. 12.

> "The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action for damages cannot, except in the case in which punitive damages may be recovered, hold a defendant liable in damages for more than the actual loss which he has inflicted by his wrong.

> * * * The law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken." Vol. 15, p. 400, Sec. 13.

This Court has ruled that Section 20 (11), the Interstate Commerce Act, Title 49, U.S.C., merely restates the common law rule of damages when it defines liability as being "the full actual loss, damage or injury" caused by the carrier. *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co., supra; Ill. Cent. R. Co.* v. *Crail, supra.*

Therefore, at common law and under the Interstate Commerce Act as well, a plaintiff in a civil action for damages can only recover compensation for the injuries sustained, the full actual loss he has suffered, and no more. This is the only general rule of damages that recurs time and time again in cases deciding the question of the proper measure of damages, and in every event, regardless of what the Court may define as the "general rule or measure of damages", the basic principle which the Courts consistently recognize as the measure of damages is that the plaintiff shall be allowed damages to indemnify him for the full amount of his loss, but no more.

In *Crail* v. *Illinois Central R. R. Co.*, 2 F. 2d 287; 13 F. 2d 459; 21 F. 2d 836; 31 F. 2d 111; 281 U.S. 57, 50 S. Ct. 180, 74 L. Ed. 699, full consideration was given to the present problem by three courts. The case first came before the District Court for the District of Minnesota, Fourth Division, and the opinion of the District Court is found at 2 F. 2d 287-290. The judgment was for the defendant. Then the Eighth Circuit Court of Appeals in 13 F. 2d 459-462, remanded the case to the District Court with instructions to enter judgment for the plaintiff. Upon remand, the District Court in 21 F. 2d 836-945, pursuant to the instructions of the Circuit Court, entered judgment for plain-

tiff but Judge Cant, who wrote the opinion, set forth fully his reasons for disagreeing with the Circuit Court. The case then returned to the Circuit Court which, in its second opinion in 31 F. 2d 111-112, consistent with the original opinion entered judgment for plaintiff. Thereafter this Court in 281 U. S. 57, 50 S. Ct. 180, 74 L. Ed. 699-704, reversed the Circuit Court and affirmed the judgment originally entered in the first instance by the trial court. Thus, when the case reached this Court two opinions had been written by the trial court and two opinions by the Circuit Court. In order to understand the basic reasoning, and full import of the decision of this Court the four opinions of the lower courts must be read and understood. The reasoning of the trial court is succinctly stated in 21 F. 2d 836, as follows:

> "In the case at bar, the broader, general and controlling rules must constantly be kept in mind; the plaintiff is entitled to be made whole. He is not suing for coal, but for money. He is entitled to the money equivalent of that which has been lost. There is no occasion for punishing the defendant by allowing excessive damages. There is no occasion for allowing plaintiff to realize a gain out of the transaction. He is not to receive a reward. He is to receive fair and reasonable compensation for his loss."

As opposed to such reasoning the opinion of the Court of Appeals in 13 F. 2d 459 discloses that that Court was of the opinion that the rule followed by the trial court in this case was correct because it was most convenient and should be applied even though in a given case its application might result in a greater award to plaintiff than actual loss sustained.

This Court (without dissent) in an opinion written by Justice Stone and reported in 281 U.S. 57, 50 S. Ct. 180, 74 L. Ed. 699-704, reversed the Circuit Court and upheld the

judgment of the trial Court. In this Court, the plaintiff, as does the Petitioner in this case, contended that the general rule established is a rule of convenience and that the necessity for uniform rule required an affirmance of the judgment of the Circuit Court of Appeals.

In passing upon this issue, this Court said:

> "This contention ignores the basic principle underlying common law remedies that they shall afford only compensation for the injury suffered * * * and leaves out of account the language of the amendment, which likewise gives only a right of recovery for 'actual loss' * * *. There is no greater inconvenience in the application of the one standard of value than the other and we perceive no advantage to be gained from an adherence to a rigid uniformity, which would justify sacrificing the reason of the rule to its letter. The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise not applicable."

Baltimore & O. C. Terminal R. Co. v. *Becker Milling Mach. Co.*, (C.C.A. 7, 1921) 272 F. 2d 933, held that inasmuch as defendant was not guilty of any intentional wrong plaintiff was entitled only to compensation.

Weirton Steel Co. v. *Isbrandtsen-Moller Co., Inc.*, 126 F. 2d 593 (C.C.A. 2, 1942), held that although the ordinary rule is indeed that damages for injury to goods while in possession of a carrier are to be computed at the difference between the sound market value at destination and the value as damaged, but at times it works out to give him more than indemnity, and when it does, the courts have refused to adopt it.

Waterman S. S. Corp. v. *United States S. R. & M. Co.*, 155 F. 2d 687 (C.C.A. 5, 1946), held that the test of market

value is but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to, if, for special reasons, it is not exact or otherwise not applicable.

U. S. v. *Northern Pac. Ry. Co.*, 116 Fed. Supp. 277 (D.C. Minn., 1953), held that the general rule appears to be that where the undisputed facts show that either of two measures of damages will fully compensate claimant for his loss, that measure should be adopted which is less expensive to the carrier liable for the loss and that plaintiff should receive full actual compensation for the loss it has sustained and no more. Receiving this, justice will be served and no unjust enrichment will thereby be permitted.

The trial court relied upon two cases decided by the Texas San Antonio Court of Civil Appeals, *Thompson* v. *The H. Rouw Company*, 237 SW 2d 662 and *Texas and New Orleans Railroad Co.* v. *The H. Rouw Company*, 271 SW 2d 666, which are clearly wrong. Such cases hold that where there is a wholesale market value the measure of damages is invariably "the difference between the market value of the perishables at destination, had the shipment arrived in good condition, and the market value of the shipment in the condition in which it actually arrived, less the freight charges"; that such rule is a "rule of convenience" and to depart from, or vary, such rule "would disturb the law of long standing" even though such rule may give the shipper more compensation for a shipment that has been damaged than if it had arrived whole and undamaged, and the rule so announced is in conflict with the decisions of this Court in the McCaull-Dinsmore Company case, the Crail case and other federal decisions above cited which are of course controlling in the field of Federal law.

Whereas the substance of the Federal rule is based on indemnity to the shipper for his loss, the substance of the

Rouw rule is a blind application of the market value rule where there is a wholesale market without regard to whether or not, by such rule, the shipper is given more than indemnity, and an adherence to a standard of convenience rather than justice. The decisions of this Court and of other Federal Courts clearly demonstrate that in the award of damages for goods damaged in interstate commerce, the courts use wholesale market value rule where that doctrine will indemnify shipper; the retail market value rule will be used if that rule must be used to award the full loss to the shipper; the contract price will be used if it is necessary to limit the compensation of the shipper to his actual loss; in certain instances expenses to the shipper resulting from the loss will be added to the award if such be necessary to fully indemnify him and proper deductions will be allowed to the carrier in applying any rule if such is required to arrive at an amount which gives full indemnity to the shipper, but no more. Both the Texas Court of Civil Appeals and the trial Court failed to recognize the fundamental proposition that the measure of damages in a case of this character is a rule of law while the ascertainment of the amount of damage is a matter of evidence. *Reider* v. *Thompson*, 197 F. 2d 158 (C.C.A. 5th). The difference in value theory is basically unsound because it is not the measure of damages, but only evidence as to one element to be considered in ascertaining the amount which will be required to indemnify or compensate Petitioner for its loss.

If the decisions of this Court and other Federal Courts above cited and referred to correctly announce the true measure of damages to shipments in interstate commerce, then an application or interpretation of the rule which would award more than indemnity simply because it might be convenient for the Court to do so would place an undue

burden on interstate commerce. It, in effect, would be similar to the Court requiring the Respondent to rebate to the Petitioner even though such rebate is prohibited by law. It is a rebate in the sense that it would constitute a gift to the extent that the amount recovered by the application of the rule of convenience would be greater than the amount which Petitioner would receive net to it had the produce arrived in an undamaged condition. The application of such a rule directly involves the question of discrimination because its application in cases similar to that now before the Court would allow Petitioner to recover more for produce which arrived in a damaged condition than another shipper might receive for identical produce which arrived in an undamaged condition. The application of the rule of convenience simply because it is convenient is not only unjust and forbidden by law, it actually placed a premium upon the shipment which is damaged in transit by penalizing the carrier and unjustly enriching the shipper.

It is accordingly respectfully submitted that the Court of Appeals correctly held that the measure of damages adopted by the Trial Court was incorrect for the reason that in this case it would afford Petitioner more than compensation or indemnity and would unjustly enrich it at the expense of Respondent and properly reversed the judgment and remanded the case to the Trial Court for an adjustment of the damages awarded Petitioner in accordance with the correct and lawful measure of damages.

The Consignees Have No Property Rights That Have Been Destroyed As Claimed by Petitioner.

The basic error in the case presented by Petitioner is its failure to analyze the position of the consignees in the light of the uncontroverted facts disclosed by the record.

As shown by Respondent's statement, *supra*, Petitioner reserved full power and authority to control the disposition to be made of the cars by consignee at destination; under the contracts and agreements between Petitioner and the consignees, they were to receive a commission of 8% only upon the amount for which they actually sold the twelve cars in question and have no claim or interest in the recovery obtained by Petitioner in this suit, will be paid no portion thereof, and the entire proceeds of final judgment will be retained by Petitioner. Under such circumstances therefore, the basic rights of the consignees are dependent upon their contracts and agreements with Petitioner and upon nothing else. They have no interest of any character in Petitioner's recovery herein, and neither do they, under the established facts, have any separate or independent claim, or right of recovery, against Respondent or other carriers participating in the transportation of the twelve cars in question. It is therefore apparent that the entire argument of Petitioner bitterly complaining of the destruction of the nonexistent property rights of the consignees is misconceived in its entirety and is advanced for the sole purpose of attempting to justify recovery by Petitioner in this case of more than compensation or indemnity.

Petitioner's Authorities.

On Page 16 of the petition Petitioner states that the precise question presented has never before been decided by this Court. Respondent is in complete disagreement with such statement and feels that the decisions in the previously cited cases fully dispose of the issue and limit the recovery solely to compensation or indemnity for the loss sustained by Petitioner.

The cases cited by Petitioner practically all bear upon the right of either the shipper or consignee to institute and

maintain suit but none of such cases are authority for the proposition that a recovery of more than compensation or indemnity can be justified.

The Question of Accounting Is Not in the Case.

In its argument on Page 26 of the petition, under the heading "E" Petitioner labors the question of accounting between a shipper and consignee. Respondent frankly admits that such accounting is of no concern whatsoever to it. However Petitioner does not undertake to argue that Respondent is not vitally concerned with the amount of damages for which it seeks recovery from Respondent for its own benefit and in which admittedly, the consignees will not share. It is Respondent's answer to such contention that Petitioner's argument completely traverses the real issue and that Respondent has a real and vital interest and concern in the amount of the judgment recovered by Petitioner for its own sole use and benefit.

The Perishable Agricultural Commodities Act Has No Application to This Case.

In its argument under heading "F" beginning on Page 27 of the petition reference is made by Petitioner to the Perishable Agricultural Commodities Act, Title 7, U.S.C., Chapter 20a, Section 499. Such legislation however was enacted primarily for the purpose of protecting, and affording additional remedies, to growers and shippers. *A. J. Conroy, Inc.*, v. *Weyl Zuckerman & Co.*, (D.C. Cal. 1941) 39 F. Supp. 784; *L. Gillarde Co.* v. *Joseph Martinelli & Co.*, (C.C.A. Mass. 1948) 169 F. 2d 60. Indeed it is difficult to imagine what application the provisions of such law has to an accounting between Petitioner and the consignees in this case who admit that they have no interest whatsoever in Petitioner's recovery and will receive no portion thereof.

Likewise the quotation from *Texas and New Orleans Railroad Co.* v. *The H. Rouw Company*, 271 SW 2d 666, 671, on Page 29 of the petition has no bearing whatsoever upon the point in issue because in this case the commission agents themselves have made it clear that they have no interest whatsoever in the claims being prosecuted by Petitioner, or in any recovery which it may obtain by judgment in this litigation.

The Question of Cartage.

Petitioner undertakes to argue the question of the deduction of the item of 50 cents from the damages which should be awarded for the transportation damage to the car of cantaloupe in Count XI received by Harry Klein & Co. in New York City. The factual situation presented by Petitioner is completely at variance with the record because Klein testified that had the five damaged crates that were rejected to the railroad, and included in the damage claim, arrived without damage and not been rejected they would have been hauled to his store at an extra charge of 50 cents which would have been charged against The H. Rouw Company on his sales account (R. 126-127). It is uncontroverted therefore that such item of 50 cents constitutes a proper deduction from the damages recoverable by Petitioner because it would have been necessarily incurred in realizing the full value of the five crates on sale, would have been charged against Petitioner and the amount which would have been realized from the sale of the cantaloupe in an undamaged condition would have been decreased by such amount of 50 cents. Therefore inasmuch as Petitioner would have sustained no loss to such extent of 50 cents if same is not deducted from the award made to it, it will to that extent be afforded more than compensation or indemnity.

The Decision in Secretary of Agriculture v. United States.

Finally Petitioner cites *Secretary of Agriculture of the United States* v. *United States et al.*, 350 U.S. 162, 76 S. Ct. 244. The application of such case to the instant case is difficult to ascertain. As we understand the majority opinion of this Court in such case it is based upon the proposition that although presumably the delivery of a case of eggs at destination with physical damage not in excess of 5% as prescribed by the grade specifications of the Department of Agriculture would not be considered commercially unsound and would be saleable at the full price, the application of the proposed tolerances in the tariff in question would necessarily operate to limit liability of the carrier by approximately the full amount of the proposed tolerances which would be contrary to the provisions of Section 20, Paragraph 11 of the Interstate Commerce Act which is also the Act here involved. However in his concurring opinion, Mr. Justice Frankfurter, who certainly is in a much better position to understand and state the reasons which impelled the decision in such case states that:

> "The starting point of the Court's determination of the issue in this case is recognition of the fact that the Cummins Amendment to the Interstate Commerce Act, Section 20 (11), does not constitute an affirmative congressional formulation of a carrier's liability for damage to goods transported by it. The legal import of that Amendment is to bar the Interstate Commerce Commission from legalizing tariffs limiting the common law liability of a carrier for such damage."

Accepting such statement at its face value it is inescapable we think that this Court still adheres to the previous concept of the law of damages as reflected in the opening portion of this brief and by implication at least reaffirms the proposition that both at common law, and under the provi-

sions of Section 20, Paragraph 11 of the Interstate Commerce Act, Petitioner is entitled to compensation or indemnity and no more. This recovery will be afforded Petitioner under the decision of the Court of Appeals, Respondent will not be penalized and Petitioner will not be unjustly enriched. Petitioner can neither expect nor demand more.

CONCLUSION.

Although the amount in controversy in the present case is not large the principle involved is of extreme importance to the railroads of this country and perhaps in the interests of uniformity and justice to the railroad industry, the petition should be granted in this case for the sole purpose of establishing a final and binding precedent throughout the country to the effect that recovery on loss and damage claims such as here involved is limited to such amount as is required to afford nothing more than compensation or indemnity for the loss actually incurred, otherwise if the Court should feel the establishment of such rule of uniformity unnecessary the petition for certiorari should be denied.

HARRY L. HALL,
Mission, Texas,
Counsel for Respondent.

I hereby certify that I have personally delivered a copy of the foregoing brief in opposition to Mr. Sawnie B. Smith and a copy of such brief to Mr. James E. Little of Edinburg, Texas, counsel for Petitioner.

HARRY L. HALL,
Counsel for Respondent.